

NO. A12-1327

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State of Minnesota  
**In Court of Appeals**

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Sean Gallagher,

*Appellant,*

v.

BNSF Railway Company,

*Respondent.*

**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF LEGAL ISSUES

- I. The Federal Safety Appliance Act (FSAA) and federal safety regulations require that railroad carriers use only rail cars that are equipped with “couplers coupling automatically by impact,” and preclude them from using cars that have “inoperative” knuckle pins. Did the District Court err in holding as a matter of law that BNSF did not violate the FSAA or federal regulations where there is evidence in the record establishing that Gallagher suffered injuries while realigning drawbars on railroad cars that failed to couple automatically by impact due to an inoperative knuckle pin?

*The District granted summary judgment to BNSF on Gallagher’s FSAA claims, finding that he had not presented sufficient evidence of ineffective coupling equipment and holding as a matter of law that BNSF did not violate the FSAA or federal safety regulations.*

### **Most Apposite Authority**

- 49 U.S.C. § 20302(a)(1)(A)
- 49 CFR § 215.123(d)(2)
- *Myers v. Reading Co.*, 331 U.S. 477 (1947)
- *Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953 (6<sup>th</sup> Cir. 1997)

- II. The Federal Employers’ Liability Act (FELA) imposes a duty on railroad carriers to provide their employees with a reasonably safe place to work. Did the District Court err in holding as a matter of law that BNSF was not negligent where there is evidence in the record that: (a) BNSF failed to properly inspect, maintain and repair its rail cars and the component parts thereof (i.e., couplers); (b) BNSF failed to properly train Gallagher on, or even inform him about, equipment that would have assisted him in aligning drawbars; (c) BNSF failed to comply with its own practice of building trains that included cars with long drawbars on straight tracks; and (d) BNSF failed to provide sufficient personnel to ensure that the tasks it assigned to Gallagher could be performed safely?

*The District Court granted summary judgment to BNSF on Gallagher’s FELA negligence claims, holding as a matter of law that BNSF could not “foresee a potential danger given that Gallagher was working in an environment and under conditions that were consistent over time and experienced by numerous employees.”*

### **Most Apposite Authority**

- *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957)
- *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108 (1963)

- *Rodriguez v. Delray Connecting Railroad*, 473 F.2d 819 (6<sup>th</sup> Cir. 1972)

### STATEMENT OF THE CASE

This case arises under the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, as a result of personal injuries that Appellant Sean Gallagher suffered on July 24, 2010 while working for Respondent BNSF in its Northtown Rail Yard. On that date, Gallagher was re-aligning drawbars on rail cars that had failed to couple automatically upon impact in violation of federal safety statutes and regulations. Because Gallagher was injured while attempting to couple rail cars, it is first important to understand how coupling occurs. Generally speaking:

The coupler consists of a knuckle joined to the end of a drawbar, which itself is fastened to a housing mechanism on the car. A knuckle is a clamp that interlocks with its mate, just as two cupped hands-placed palms together with the fingertips pointing in opposite directions interlock when the fingers are curled. When cars come together, the open knuckle on one car engages a closed knuckle on the other car, automatically coupling the cars. The drawbar extends the knuckle out from the end of the car and is designed to pivot in its housing, allowing the knuckled end some lateral play to prevent moving cars from derailling on a curved track.<sup>1</sup>

The coupling mechanism also includes a "pin" inside the coupler knuckle that "drops into position by gravity when the knuckle closes and prevents reopening of the knuckle until the coupling mechanism is activated."<sup>2</sup> If the pin does not drop, the knuckles will not lock and coupling will not be complete.

On July 24, 2010, Gallagher and Jack Barbier, another BNSF switchman, were building trains in BNSF's Northtown "hump" yard.

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<sup>1</sup> *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 401-02 (1996).

<sup>2</sup> *Railway Age's Comprehensive Railroad Directory*, 2<sup>nd</sup> Ed. (2002).

The hump is a manmade hill over which railroad cars are pushed up by a locomotive. At the top of the hump, one or two switchmen work as pin pullers. . . The pin pullers pull a device called a pin lifter on the side of a rail car. This uncouples cars from each other and allows them to move down the hump. The speed of the cars is controlled by retarders which are operated through a computer system and adjust the speed of the cars through a braking mechanism applied to the outside of the wheels. The cars are directed by computer into various tracks in what is called the "bowl." Cars going over the hump can be sent individually into various tracks or in groups of cars. Cars sent over the hump should couple automatically to the cars in the bowl.<sup>3</sup>

While performing his duties, Gallagher came upon two rail cars that had failed to couple as they should have when they descended the hump into the bowl (yard tracks). Although the two cars were located on a curved portion of the track, the drawbars were aligned, the knuckles were engaged, and the cars appeared to be coupled (or "knuckled"). However, when Gallagher "stretched" the train (by moving the engine ahead slowly to determine if all of the cars were coupled) the cars separated, revealing that the knuckle pin had not dropped and the coupling had not been completed.

Gallagher then made several unsuccessful attempts to couple the cars, ensuring before each attempt that the drawbars were properly aligned and that at least one of the knuckles was open (as is required for a successful coupling) before bringing the train back into the joint with sufficient force to effectuate the coupling. Each time, however, the coupling failed because the knuckle pin on the trailing car did not drop. On the last of these failed attempts, the impact of the unsuccessful coupling flung the drawbars away

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<sup>3</sup> *Hawley Aff.*, ¶3-4 (App. 30-31).

from Gallagher and out of alignment, which required him to manually move them back into place. While so engaged, he suffered serious back injuries.

In July 2011, Gallagher filed suit against BNSF under the FELA, alleging that his injuries were caused, in whole or in part, by its negligence in failing to provide him with a reasonably safe place to work. Specifically, Gallagher claims that BNSF was negligent in failing to properly inspect, maintain and repair its rail cars and their coupling components, including the drawbars, which were insufficiently lubricated and contaminated with dirt and debris, making them stiff and hard to move; in failing to provide him with proper (or any) training regarding the use of devices designed to assist in aligning drawbars; in failing to assign sufficient personnel to ensure the work being done in the Northtown Yard could be accomplished safely; and in humping cars with long drawbars onto curved tracks, which BNSF knew decreased the chances of successful coupling and increased the potential for injury when employees have to realign drawbars.

Gallagher also asserted strict liability claims, alleging that BNSF violated the Federal Safety Appliance Act (FSAA), 49 U.S.C. § 20301, *et seq.*, using rail cars equipped with couplers that failed to “coupl[e] automatically by impact” in violation of 49 U.S.C. § 20302(a)(1)(A), and by using a rail car that had an “inoperative” knuckle pin, which constitutes a violation of the Railroad Freight Car Safety Standards; specifically 49 CFR § 215.123(d)(2).

BNSF answered Gallagher’s Complaint denying each of his liability allegations, and the parties ultimately brought cross-motions for summary judgment on the FSAA claims. BNSF also moved for summary judgment on Gallagher’s FELA negligence

claims. On June 27, 2012, the Hennepin County District Court, Honorable Susan M. Robiner, presiding, issued an Order and Memorandum granting summary judgment to BNSF in all respects and dismissing the case. This appeal follows.

### STATEMENT OF FACTS

#### **I. The incident of July 24, 2010.**

On July 24, 2010, Plaintiff Sean Gallagher reported to work as a switchman at BNSF's Northtown Yard, which is large facility comprised of approximately 63 different tracks. *Gallagher Dep., 121:9-16, 128:15-23* (App. 12, 14). Although Gallagher hired on with BNSF in May 2008, he was furloughed for a period of approximately 14 months beginning in January 2009. *See Gallagher Dep., 26:3-14, 28:12-14* (App. 8). At the time of this incident he was still relatively inexperienced, with less than a year of actual railroad work.

That day, he and fellow switchman/conductor Jack Barbier were working a "pull out job," which, as the name implies, consists of pulling groups of cars out of various classification tracks and moving them onto the departure tracks. *Gallagher Dep.* at 123:10-1249 (App. 13). In his deposition, Gallagher described the process of "putting a track together" for removal to the departure tracks:

- A. You lock onto the car [with the locomotive] and make sure that you have five of them and call for a set and center, put your air hoses on the first five cars and they you'd stretch to see how many you have.
- Q. Okay.
- A. And then you work your way down going back and making sure that they are all coupled together.
- Q. So you grab five [cars] and then you do you grab another five and then another five?

- A. No, you load air into the first five . . . You have to have five cars of air, so your air brakes work. You're going to have a long, long wait, so you have to have air and then you go through and you make sure the track is put together.
- Q. And by put together, what do you mean?
- A. All of the cars lock together.
- Q. As they should have coming down the hump?
- A. Yes, they should connect.

*Gallagher Dep.*, 134:9 – 135:5 (App. 16) (emphasis added). Gary Hawley and Tom Kuduk, two retired BNSF switchman with long time experience working at the Northtown likewise testified that “[c]ars sent over the hump should couple automatically to the cars in the bowl.” *Hawley Aff.*, ¶3 (App. 31); *Kuduk Aff.*, ¶3 (App. 34).

The pull out job is a remote control operation (RCO), which means that the crew controls the movement of its locomotive via remote control. *Gallagher Dep.*, 125:6-13. (App. 13) After participating in a job safety briefing, Gallagher and Barbier decided that Barbier would operate the locomotive while collecting the first group of cars and Gallagher would ride on the engine to “[p]rotect the head end.”<sup>4</sup> *Gallagher Dep.*, 122:2-22, 127:16-128:6 (App. 13-14) They planned to alternate roles thereafter, with Gallagher controlling the locomotive while gathering the second group of cars, Barbier controlling it for the third group, and so on until the work was completed. *Id.*

Initially the shift proceeded uneventfully, and nothing seemed amiss as Gallagher took control of the engine to pull out a group of cars from one of the “single digit” tracks (track 3 or 6) “on the low side” of the classification yard. *Gallagher Dep.*, 128:15-129:17

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<sup>4</sup> In railroad parlance, “protecting the head end” means riding on the locomotive to watch for obstructions on the tracks while it is under the control of a remote control operator, who may be unable to see the tracks. *Gallagher Dep.*, 128:3-6 (App. 14).

(App. 14); *Handwritten Statement dated July 28, 2010* (App. 37).<sup>5</sup> As explained in further detail below, the low-numbered tracks at Northtown are more curved, which is significant because BNSF admits that coupling cars with longer drawbars on curved tracks is difficult and increases the rate of failed couplings. *See Dingmann Dep., 17:5-23, 45:10-46:9* (App. 39, 40-41).

After Gallagher coupled the first five cars to the locomotive, he started to “stretch” the train by “walking back and slowly moving the engine up” to see if the cars were connected and ready to move out. *Gallagher Dep., 135:8-136:12*. (App. 16). Upon doing so, he noticed gaps between some of the cars, indicating that they had not coupled automatically as they should have when they were sent down the hump. *Id.* at 136:13-137:2, 138:5-25 (App. 16-17). Although Gallagher was not able to give an exact number of cars that failed to couple, he explained that “[t]here was a lot of them,” including numerous bulkhead flat cars. *Gallagher Dep., 138:21-139:3* (App. 17).

Gallagher communicated via radio with Barbier (who was still on the engine “protecting the head end”) and after receiving confirmation that there would be no train movement, he went “in between” and began to manually realign the drawbars. *Gallagher Dep., 139:3-21, 141:6-144:4* (App. 17-18). After successfully realigning the drawbars on a number of cars, Gallagher came to the cars that caused his injuries, one of which was a bulkhead flat car. *Id.* at 145:3-147:5 (App. 18-19). Although these cars were located on a curve, Gallagher explained that the drawbars were properly aligned and that the cars

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<sup>5</sup> This statement was written by Gallagher’s supervisor, BNSF Trainmaster Derek Huffaker, and signed by both he and Gallagher.

appeared to be coupled (or “knuckled”). *Id. at 146:16-20* (App. 19). This is significant, because knuckles will not connect if the drawbars are not properly aligned. *Id. at 186:7-9* (App. 27). When Gallagher stretched the train the cars separated (which indicates that the pin failed to drop). *Id. at 146:14-147:3* (App. 19).

Gallagher then made a number of attempts to couple the cars, each time ensuring that the drawbars were properly aligned and that at least one knuckle was open before bringing the train back with sufficient force to effectuate the coupling. *Gallagher Dep., 146:16-147:23, 150:18-20; Gallagher Aff., ¶3* (App. 19-20, 42). Each time the coupling failed because the knuckle pin on the car into which Gallagher was trying to couple the bulkhead flat car would not drop. *Gallagher Dep., 184:23-186:6* (App. 26-27). On the last attempt before his injury, the impact of the unsuccessful coupling “flung” the drawbars away from Gallagher and out of alignment. *Gallagher Dep., 146:16-147:5* (App. 19). In his deposition, Gallagher described the arduous process of trying to get the cars coupled:

- Q. So when you got to the car where you got injured, did you approach it just like you had the others, you saw it out of line?
- A. It wasn't out of line. It was on the curve and I thought it was knuckled. When I stretched it out, it wasn't knuckled and then back backed it [the train] up, tried to re-knuckle it and it didn't re-knuckle and then I pulled it out again and backed it up again and then - - when it tried to knuckle that time it flung them both [the drawbars] away from me and I had to separate them 50 feet again and straighten it out and tried to redo it again and it didn't work.
- Q. So - -
- A. There was multiple attempts.
- Q. All right. So you thought they were together and discovered that they were not and they were on a curve?
- A. Yes.

Q. And if I am understanding you correctly, it looked like the drawbars were straight and so you tried again to couple them, correct?

A. Correct.

Q. And you tried one more time or two more times after that to couple them?

A. I tried a few times, yes.

Q. And then on the last attempt the drawbars on both cars got pushed away from you toward kind of the far rail, if you will?

A. Yes.

\*\*\*

Q. And then what did you do?

A. I tried to align it again and go back and it did not connect again and then it sent them [the drawbars] in the opposite direction.

\*\*\*

Q. Okay.

A. So I had to get my 50 feet [of separation between the cars] again and was pushing on the knuckle or on the drawbar again on the one that was towards me.

\*\*\*

A. . . . I was going through and I had to do multiple moves on this car and I couldn't get the pin to drop, it wasn't on the car I hurt myself on the drawbar. It was the other car. It was the north side car.

Q. How do you mean?

A. That's why I kept having to retry to couple it because I couldn't get the pin to fall. Every time I make a connection it wouldn't work so I would have to separate it out . . . . . So there was a malfunction, it just wasn't on the car that I hurt myself on.

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Q. So there was a defect on the other car, the one you hadn't touched?

A. It's a defect. I mean they [the knuckle pins] should drop. The pin should drop, make a connection.

Q. And if it doesn't drop that's a defect?

A. They have to connect and couple so that you can pull them. If it doesn't - - if the pin doesn't fall, the knuckle doesn't stay closed so you can't pull them.

Q. Will they connect if they are not properly aligned?

A. Yes. No, the they have to be properly aligned.

*Gallagher Dep., 146:16-147:9, 147:17-148:2, 148:16-19, 149:11-25, 184:23-185:14, 185:23-186:9 (App. 19, 26-27) (emphasis added).*

As noted above, it was while Gallagher was manually realigning the drawbar on the bulkhead flat car after a failed coupling attempt that he felt (and heard) a pop in his lower back. *Gallagher Dep.*, 149:12-25 (App. 19). In his deposition, Gallagher explained that when he tried to realign the drawbar it moved “slowly,” and that it was “stiff” and “hard to move” because it was not properly lubricated and because there was dirt in the housing mechanism. *Gallagher Dep.*, 150:21-151:13, 198:24-199:22 (App. 20, 29).

Ultimately, Gallagher was able to get the cars coupled, at which point he gave control of the locomotive over to Barbier, who pulled the train away. *Gallagher Dep.*, 155:15-17, 156:4-157:6 (App. 21). By the time Gallagher rejoined Barbier he was feeling pain in his lower back that was growing progressively worse. *Id.* at 157:7-158:19 (App. 21-22). He boarded the engine and reported his injury to Barbier, who suggested that he complete a personal injury report. *Id.* At that time, Gallagher was hopeful that he had just pulled a muscle, and because he had just returned from a furlough he was understandably reluctant to fill out an injury report, so he declined to do so at that time. *Id.*

Although Gallagher was able to finish his shift, he let Barbier do most of the physical labor after the incident because his back continued to hurt. *Gallagher Dep.*, 159:12-160:16 (App. 22). When his pain persisted and grew worse even after the work day was done, he sought treatment later that evening at the emergency room, where he was examined, given medication, x-rayed, and discharged with restrictions that kept him off work. *Id.* at 60:11-61:24, 161:24-162:12 (App. 9, 22-23).

By the time Gallagher was discharged it was very late (approximately 2:00-3:00 a.m.), but because he was scheduled to work the next day, he called and reported the

incident and his injuries to BNSF management personnel, who told him to “lay off sick.” *Gallagher Dep.*, 61:12-13, 162:22-163:23, 164:5-167:8, 172:11-173:7 (App. 9, 23-25). Thereafter, on July 28, 2010, when Gallagher’s pain had receded a bit and when he was no longer on “heavy medication,” he returned to the Northtown Yard, where he again discussed the incident and his injuries with his supervisors. *Id.* at 168:8-169:9 (App. 24). The next day (July 29), he completed a personal injury report. (App. 44). Although Gallagher checked the box marked “no” in response to the question: “was there any defect/malfunction/problem of/with the equipment or work,” he explained that he had to answer that way because the inoperative pin was not on the car with the drawbar he was moving at the time of his injury, but rather was on the adjacent car. *Gallagher Dep.*, 184:5-186:6 (App. 26).

**II. There is evidence in the record that BNSF violated the FSAA and federal safety regulations on July 24, 2010.**

As noted above, when Gallagher first came upon the subject rail cars after they were initially sent down the hump, the drawbars were aligned, the knuckles had mated, and the cars appeared to be coupled. *Gallagher Dep.*, 146:16-147:9 (App. 19). It was only when he “stretched” the train and the cars separated that he realized the pin had not fallen. *Id.* Gallagher further testified that despite ensuring that the drawbars were aligned and that at least one knuckle was open before bringing the cars back with sufficient force to effectuate a coupling, subsequent attempts to connect the cars failed because the knuckle pin on the trailing car was inoperative and would not drop. *Gallagher Dep.*, 184:23-185:14, 185:23-186:9; *Gallagher Aff.*, ¶3 (App. 26-27; 42).

Michael O'Brien, a railroad safety consultant with over 40 years of industry experience, including a quarter century as an FRA Motive Power & Equipment Safety Inspector and Specialist, explained that the failure to couple and inoperative knuckle pin constitute a violation of the FSAA and federal regulations. In his report he opines:

“Each time the subject freight car failed to couple, the car was in violation of the Safety Appliance Act, § 20302(a)(1)(A):

Safety Appliance Act, § 20302(a)

“20302(a) General. – Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines –  
20302(a)(1) a vehicle only if it is equipped with –  
20302(a)(1)(A) **couplers coupling automatically by impact**, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles.”

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The unidentified freight car failed to couple automatically on impact, in violation of the Safety Appliance Act, § 20302(a)(1)(A), and the Railroad Freight Car Safety Standards.<sup>6</sup>

*O'Brien Report at 7, 11* (App. 51, 55) (bold and underlining in original).

O'Brien's opinions are corroborated by testimony from BNSF management officials: General Foreman Carlos Canchola, Assistant General Car Foreman Jeff Jordan, and Trainmaster Tim Dingmann, all of whom confirmed that a knuckle pin that fails to drop with the application of sufficient force<sup>7</sup> constitutes a violation of the FSAA and/or

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<sup>6</sup> Specifically, 49 CFR § 215.123(d)(2), which prohibits railroad carriers from using a car that has an “inoperative” knuckle pin.

<sup>7</sup> BNSF Trainmaster Erik Rasmussen testified that an employee should be able to close a knuckle manually by applying only a “couple pounds” of pressure. *Rasmussen Dep., 48:16-49:4* (App. 58). Accordingly, he acknowledged that if the coupler was functioning properly, the pin should have dropped and the coupling should have occurred when Gallagher backed the other cars into it. *Id.* Additionally, Gallagher testified that each

federal safety regulations. See *Jordan Dep.*, 23:22-24; *Canchola Dep.*, 22:20-23:15, 29:20-30:8; *Dingmann Dep.*, 72:20-73:16 (excerpts of these gentlemen's depositions are cited and excerpts are reprinted in Michael O'Brien's report at pgs. 4-6 (App. 48-50)).

**III. There is evidence in the record that BNSF was negligent in violation of the FELA on July 24, 2010.**

**A. There is evidence that BNSF negligently failed to provide Gallagher with safe equipment, sufficient training, and proper tools.**

It is undisputed that knuckles and drawbars are heavy and may require a considerable amount of force to align. *Hawley Aff.*, ¶7 (App. 31); *Kuduk Aff.*, ¶7 (App. 34). Compounding the difficulty posed by the weight of the equipment is the fact that the drawbar on the subject bulkhead flat car had not been properly lubricated and/or cleaned, rendering it "stiff" and "hard to move." *Gallagher Dep.*, 150:21-151:13, 198:24-199:2 (App. 20, 29). In his deposition, Gallagher described the difficulties he experienced while trying to re-align the drawbar:

Q. No, I mean on this third try when you felt the pop, had you moved the drawbar at all at that time.

A. Yes, it was. It was slowly moving.

Q. How did it move the other two times you aligned it?

A. It was stiff, like I said, they are all stiff. The grease wears out and dirt gets in them and they are tough.

Q. Did you inspect it at all to see if maybe it was broken or worn or not lubricated?

A. Like I said, they are all – need lubrication. There's dirt in them. They don't get lubricated enough. They are all tough.

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A. . . . The drawbars could have been lubed more. They are hard to move. I could not get the pin to fall.

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coupling attempt he made was "done with enough force so that the pin should have dropped to complete the coupling." *Gallagher Aff.*, ¶3 (App. 42).

- Q. Were these drawbars that you hurt yourself on on the date of the accident any more difficult to move than the drawbars you had been working with in your career on the railroad.
- A. They are all - - some move good, some don't
- Q. Were these particularly bad?
- A. They were difficult.

*Gallagher Dep., 150:21-151:11, 199:12-22 (App. 20, 29) (emphasis added).*

Retired BNSF switchman Gary Hawley, who worked in the Northtown yard for nearly 20 years and who served as hump foreman from approximately 2001 to 2005,<sup>8</sup> confirmed the lack of maintenance with respect to drawbars on rail cars at Northtown, estimating that “up to 75% of the time” they “were not properly lubricated and would have dirt, grit, and other material that would make lining them more difficult.” *Hawley Aff.*, ¶10 (App. 32).

Tom Kuduk, another long-time (now-retired) BNSF employee with significant personal experience working in the Northtown yard testified similarly, explaining that “[d]uring my years at the BNSF, including 2010, drawbars were very often not properly maintained.” *Kuduk Aff.*, ¶11 (App. 35). Specifically, “they lacked proper lubrication,” and were corrupted by “[d]irt, rust, and other materials,” which would “make adjusting them much harder.” *Id.*

The fact that the drawbar was stiff and hard to move is significant in light of BNSF's concession that it has “mechanical devices” (e.g., knuckle mates or alignment straps) “that may be used to align a draw bar that does not move with the application of

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<sup>8</sup> As a hump foreman, Hawley “was in control of cars going over the hump and became “very familiar with hump operations, the aligning of drawbars, and issues relating to the coupling of cars.” *Hawley Aff.*, ¶1 (App. 30).

minimal force.” *BNSF Memo. in Supp. of Mot. for Summ. Judg. at 21*. Per former FRA Motive Power and Equipment Specialist Michael O’Brien, such devices “certainly ease the physical burden on train crew members when adjusting drawbars.” *O’Brien Report at 7* (App. 51). However, BNSF never provided Gallagher with any training on how to use those devices. *Gallagher Dep., 111:25-113:3, 117:19-118:1, 197:2-25, 198:11-23* (App. 10-12, 28-29). In fact, the railroad never even told him they existed. *Id.* The fact that Gallagher was unaware of these assistive tools is not surprising in light of testimony from Kuduk and Hawley, who both served as training coordinators and who were the BNSF instructors on training and procedures for new employees (including Gallagher), confirmed that BNSF management never instructed them to train new employees with respect to using those devices. *Kuduk Aff., ¶8* (App. 34-35); *Hawley Aff., ¶8* (App. 31).

**B. There is evidence that BNSF negligently utilized unsafe job procedures and failed to provide sufficient personnel at the Northtown Yard.**

As noted above, at the time of his injuries, Gallagher was working with a bulkhead flat car located on one of the “single digit” curved tracks. Bulkhead flat cars have long drawbars,<sup>9</sup> and BNSF employees had complained about difficulties associated with coupling cars equipped with longer draw bars on curved tracks. *Gallagher Dep., 192:19-193:9* (App. 27a). Indeed, Gallagher described this as a “common complaint” in the Northtown yard. *Id.*

Those complaints stemmed from the fact that building trains with cars that have long drawbars on curved tracks “make[s] it more difficult to align drawbars and

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<sup>9</sup> *Hawley Aff., ¶9* (App. 32).

increase[s] the failure for pins dropping even though the drawbars are properly aligned.” *Hawley Aff.*, at ¶9 (App. 32). This, in turn, increases the need for employees to go in between rail cars and manually align drawbars, which BNSF concedes elevates the risk of injury. *Mullen Dep.*, 48:23-49:1, 50:6-9 (App. 60-62). In his deposition BNSF Superintendent Phillip Mullen testified:

Q. And also you’re aware of the fact that anytime someone goes in between the cars, that that does increase their potential risk. Would you agree with that?

A. I would.  
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Q. Okay. Would you agree with me that anytime you have to adjust a drawbar, there is a potential for injury?

A. I suppose, yeah.

*Id.* Hawley testified similarly by affidavit, confirming that aligning drawbars is accompanied by “a significant increase in the risk of injury.” *Hawley Aff.*, ¶7 (App. 31).

In his deposition, BNSF Trainmaster Timothy Dingmann acknowledged that because of the difficulties associated with coupling cars with long drawbars on curved tracks, BNSF has a practice of building trains that include such cars on tracks that are straight or have more gradual curves (which practice was obviously not followed in the instant case). *Dingmann Dep.*, 17:5-18, 45:10-46:9 (App. 39, 40-41). Gary Hawley confirmed the existence of this practice, explaining that when he served as hump foreman at Northtown, “we put cars with long drawbars on the straighter tracks to increase the likelihood of safe couplings.” *Hawley Aff.*, ¶8 (App. 31). Conversely, “[w]e avoided the low numbered and high numbered tracks in the bowl because of the curves,” which

“make it more difficult to align drawbars and increase the failure or pins dropping.” *Id. at* ¶¶8-9 (App. 31-32); *see also Kuduk Aff.*, ¶10 (App. 35).

It is also important to be aware of the number of employees working in the Northtown Yard generally, and of the number of employees involved in the “humping” process in particular. In his affidavit Kuduk explains that:

When I started with the railroad, switching crews had four employees: an engineer, a foreman, and two switchmen. The two switchmen would be on the ground to perform any lining of drawbars or adjusting of them. Having two employees do this made the job considerably easier and lessened the risk of injury. When the railroad began using remote control locomotives in recent years, only one employee could be on the ground adjusting drawbars when performing a pull-out job such as Mr. Gallagher was working. . . This leaves only one employee to align multiple drawbars and that puts more strain on that person.

*Kuduk Aff.*, ¶15(App. 36).

With respect to hump operations, Kuduk noted that switchmen have to “pull pins” to uncouple cars before they are rolled down in the bowl. *Kuduk Aff.*, ¶3 (App. 34). For the last several years, BNSF has used only one pin puller at Northtown. *Kuduk Aff.*, ¶3 (App. 34); *Hawley Aff.*, ¶4 (App. 31). When only one pin puller is working, they operate the pin lifter from the west side of the hump, which “opens the knuckle on the south end of the cars” and leaves the knuckle on the north end closed as the car rolls down into the bowl. *Kuduk Aff.*, ¶4 (App. 34); *Hawley Aff.*, ¶4 (App. 31). Thus, in hump operations using only one pin puller, only one knuckle is opened, which “significantly increases the likelihood of unsuccessful couplings.” *Kuduk Aff.*, ¶6 (App. 34); *Hawley Aff.*, ¶6 (App. 31). In short, “it is always best to have both knuckles open” because “[t]his significantly

increases the likelihood of a successful coupling where the knuckles come together and the pin falls.” *Kuduk Aff.*, ¶13 (App. 35); *Hawley Aff.*, ¶12 (App. 32).

#### **IV. The District Court grants summary judgment to BNSF.**

As noted previously, the parties brought cross-motions for summary judgment on Gallagher’s FSAA claims, with each side arguing that the undisputed facts demonstrated their entitlement to judgment as a matter of law. BNSF also moved for summary judgment on Gallagher’s FELA negligence claims. The District Court denied relief to Gallagher and granted it to BNSF in all respects.

With regard to Gallagher’s FSAA claim, the District Court found that “[t]he record contains no evidence of an equipment failure – either a malfunctioning pin or ineffective drawbars.” *Order Granting Summ. Judg.* at 10 (Add. 10). The court’s finding in that regard rests primarily, if not exclusively, on its conclusion that “Gallagher’s ability to ultimately couple the two cars successfully after aligning the drawbars “indicates efficient coupling equipment (i.e. properly functioning knuckles and pins”). *Id.* at 9 (Add. 9).

The District Court was similarly dismissive of Gallagher’s negligence claims, finding that BNSF was not negligent because “Gallagher presented no evidence that his job on the day of his injury exceeded typical duties or that his training rendered him ill-equipped to perform the necessary alignment.” *Order Granting Summ. Judg.* at 12 (Add. 12). Importantly, the District Court did not explicitly hold that Gallagher’s working conditions were reasonably safe as a matter of law (nor could it, as the evidence in the record is to the contrary). Instead, it concluded that “[t]he Court fails to see how a

reasonably prudent person would foresee a potential danger given that Gallagher was working in an environment and under conditions that were consistent over time and experienced by numerous employees.” *Id.*

### STANDARD OF REVIEW

Under Minn. R. Civ. P. 56.03, summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. On an appeal from summary judgment, the appellate courts ask two questions: “(1) whether there are any genuine issues of material fact, and (2) whether the lower courts erred in their application of the law.” *J.E.B. v. Danks*, 785 N.W.2d 741, 745 (Minn. 2010), quoting *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This Court “reviews both questions de novo.” *Engineering & Const. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 803 N.W.2d 916, 920 (Minn. Ct. App. 2011).

Summary judgment has been described as “an extraordinary remedy – a ‘blunt instrument.’” *Katzner v. Kelleher Construction*, 535 N.W.2d 825, 828 (Minn. Ct. App. 1995). Therefore, when reviewing an order granting summary judgment, this Court must “view the evidence in a light most favorable to the party against whom summary judgment was granted,” and must “accept as true the factual allegations produced by the non-movant.” *K.B. v. Evangelical Lutheran Church in America*, 538 N.W.2d 152, 156 (Minn. Ct. App. 1995). Additionally, “any doubts of the existence of a material fact are resolved in favor of the losing party.” *H.B. by and through Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). Finally, this Court “need not defer to the trial court’s decision” regarding legal issues. *Zacharias v. Minnesota Dep’t of Natural Resources*, 506

N.W.2d 313, 316 (Minn. Ct. App. 1993); *see also Cummings v. Koehnen*, 556 N.W.2d 586, 588 (Minn. Ct. App. 1996) (“No deference need be given to the district court’s application of the law.”)

In considering this appeal it is also important to remember “the clear Congressional intent” of the FELA is to ensure “that, to the maximum extent proper questions in actions arising under the Act should be left to the jury.” *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 n. 30 (1943). Indeed, “trial by jury is part of the remedy”<sup>10</sup> in FELA cases, and “to deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.” *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 601 (1945).

To ensure that the maximum number of cases get to trial, “the jury’s power to engage in inferences” in a FELA case “is significantly broader than in common law negligence actions.” *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9<sup>th</sup> Cir. 1987); *see also Lynch v. Northeast Regional Commuter R. Corp.*, -- F.3d --, No. 11-2173, 2012 WL 5290146, at \*8 (7<sup>th</sup> Cir. Oct. 29, 2012) (explaining that the FELA “vests the jury with broad discretion to engage in common sense inferences regarding issues of causation and fault”) (citation omitted).

In recognition of the foregoing principles, this Court has held that “[a] FELA plaintiff need only present a scintilla of evidence tending to show negligence to survive summary judgment.” *Smith v. Soo Line R. Co.*, 617 N.W.2d 437, 440 (Minn. Ct. App. 2000) (emphasis added). Of course, this “scintilla of evidence” does not have to be direct

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<sup>10</sup> *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir. 1976).

evidence, but can be entirely circumstantial. *See Lynch*, -- F.3d --, 2012 WL 5290146 at \*7 (stating, “circumstantial evidence alone can support a jury verdict”). In fact, “[c]ircumstantial evidence is not only sufficient, [it] may also be more certain, satisfying and persuasive than direct evidence.” *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n. 17 (1957).

Finally, Minnesota courts have long accepted the precept that negligence claims generally “present questions of fact not susceptible to summary adjudication.” *Blatz v. Allina Health Sys.*, 622 N.W.2d 376, 383 (Minn. Ct. App. 2001). FELA cases are even less susceptible to summary adjudication, as such cases “must not be dismissed at the summary judgment phase unless there is absolutely no reasonable basis for a jury to find for the plaintiff.” *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 828 (2d Cir. 1994); *see also Finley v. Nat'l R.R. Passenger Corp.*, CIV.A. 95-3594, 1997 WL 59322, at \*4 (E.D. Pa. Feb. 12, 1997).

## ARGUMENT

### **I. OVERVIEW OF THE FELA**

As one court recently pointed out, “[t]o the vast majority of the bar (and the bench) a FELA case is essentially, if not totally, *terra incongnita*.” *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1026 (Md. Ct. Spec. App. 2004). This appears to have been the case in the District Court, as its summary judgment memorandum includes a discussion of Minnesota negligence law (which does not apply here), a reference to “proximate cause” (which is not the FELA standard), and a separate section granting summary judgment to BNSF on Gallagher’s purported “common-law negligence claim” (which

Gallagher did not allege because no such claim exists in his favor). Therefore, a brief discussion of the FELA and its uniquely pro-plaintiff interpretation may prove helpful.

**A. The FELA is an “avowed departure from the rules of common law.”<sup>11</sup>**

The courts have long recognized that the FELA is a “remedial and humanitarian” statute. *Mounts v. Grand Trunk W. R.*, 198 F.3d 578, 580 (6<sup>th</sup> Cir. 2000). Although FELA plaintiffs must prove negligence (albeit slight), the courts have noted that the Act “bears a strong resemblance to workers’ compensation laws” and that “the social forces that produced it and the generating spirit that drives it resonate with the language and philosophy of workers’ compensation principles.” *Miller*, 858 A.2d at 1030-31. These “social forces” include the fact that “throughout the 1870’s, 80’s and 90’s, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what came to be increasingly seen as a national tragedy, if not a national scandal.” *Miller*, 858 A.2d at 1029. In an attempt to stem the tide of injuries, Congress took action and enacted the FELA “to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.” *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (J. Douglas, concurring).

At its core, the FELA constitutes Congressional recognition that railroad employers are simply better able to bear the cost of industrial injuries than are the injured workers or their families. As the United States Supreme Court explained in *Kernan v. American Dredging Co.*, “the industrial employer ha[s] a special responsibility toward his

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<sup>11</sup> *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 329 (1958).

workers,” and “[t]herefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the ‘human overhead’ of doing business.” 355 U.S. 426, 431-32 (1958) (emphasis added). In light of the foregoing, “courts look with favor on FELA suits” and interpret the Act “to impose a liberal view of fault and causation that makes recovery relatively easy.” *Miller*, 858 A.2d at 1031-32.

**B. The FELA employs relaxed standards of negligence, causation, and foreseeability.**

**1. The FELA’s “in whole or in part” liability standard.**

45 U.S.C. § 51 provides that:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Emphasis added.)

The FELA’s “in whole or in part” standard is “substantially more liberal than that governing ordinary common law negligence actions.” *Lindauer v. New York Cent. R. Co.*, 408 F.2d 638, 640 (2d Cir. 1969) (emphasis added). Indeed, the United States Supreme Court has held a railroad defendant is liable under the FELA if “the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in

producing the injury or death for which damages are sought.” *Rogers*, 352 U.S. at 506-507 (emphasis added). Accordingly, “judicial appraisal of the proofs to determine whether a jury question is presented” in a FELA case “is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.” *Id.* And that test is usually met, as evidenced by the fact that many FELA actions have been submitted to a jury based upon . . . “evidence scarcely more substantial than pigeon bone broth.” *Smith*, 617 N.W. 2d at 439, quoting *Harbin v. Burlington N. R. Co.*, 921 F.2d 129, 132 (7<sup>th</sup> Cir. 1990).

## **2. The FELA’s diminished standard of causation.**

In *CSX Transp., Inc. v. McBride*, the Supreme Court recently reiterated that “in comparison to tort litigation at common law, ‘a relaxed standard of causation applies under FELA.’” 131 S.Ct. 2630, 2636 (2011) (citation omitted). Accordingly, in order to prevail on his claim, an injured FELA plaintiff does not need to prove that the railroad’s negligence or statutory/regulatory violation was the “sole or whole” cause of his injury, or “the direct or proximate cause.” *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 608-09 (9th Cir. 1993). Instead, all he needs to show is “some causal connection between a defendant’s negligence and [his] injuries.” *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994).

## **3. The FELA’s relaxed standard of foreseeability.**

The FELA also employs a relaxed standard of foreseeability under which liability “attaches if the railroad knew, or by the exercise of due care should have known of the danger or risk to an employee.” *Patterson v. Norfolk & Western Ry. Co.*, 489 F.2d 303,

305 (6<sup>th</sup> Cir. 1973). It is not necessary that the railroad foresee the exact injury that occurs. Instead, it is sufficient if the railroad “might reasonably have foreseen that an injury might occur.” *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 808 (6<sup>th</sup> Cir. 1985) (emphasis added). As the Supreme Court explained in *Gallick v. Baltimore & O. R. Co.*, “we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing [sic] which his negligence played any part, even the slightest, such a tortfeasor must compensate his victim for even improbable or unexpectedly severe consequences of his wrongful act.” 372 U.S. 108, 120 (1963) (internal citations omitted).

## **II. THE DISTRICT COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT BNSF DID NOT VIOLATE THE FSAA OR FEDERAL REGULATIONS ON JULY 24, 2010.**

### **A. BNSF’s violation of the FSAA and/or federal safety regulations constitutes negligence per se and results in strict liability.**

The FSAA imposes an absolute duty upon railroads to use only cars that are equipped with properly functioning safety appliances, including couplers. Specifically, the Act provides that a carrier may use a car “only if it is equipped with couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of going between the ends of the vehicles.” 49 U.S.C. § 20302(a)(1)(A) (emphasis added). Federal safety regulations similarly require that each rail car’s coupler components function properly, and they prohibit carriers from using a car if it “has a knuckle pin or knuckle thrower that is: . . . inoperative.” 49 CFR § 215.123(d)(2).

The United States Supreme Court has consistently emphasized that FELA plaintiffs are not required to prove negligence in cases where the railroad’s violation of

the FSAA or any other “statute enacted for the safety of employees”<sup>12</sup> causes or contributes, in whole or in part, to their injuries. In *Brady v. Terminal R. Ass’n. of St. Louis*, the Supreme Court explained that statutory liability under the FSAA “is not based upon the carrier’s negligence.” 303 U.S. 10, 15 (1938). Instead, “[t]he duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous.” 303 U.S. 10, 15 (1938); *see also O’Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949) (“A failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability – a liability that cannot be escaped by proof of care or diligence.”); *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 409 (1996) (reaffirming that “failure to perform as required by the SAA is itself an actionable wrong dependent on neither negligence nor proof of a defect”).

Nor is notice to the railroad an element of an FSAA claim. *See McCarthy v. Pennsylvania R. Co.*, 156 F.2d 877, 880 (1<sup>st</sup> Cir. 1946) (holding that because the railroad’s duty under the Act is “absolute and continuing,” “[n]o notice to the defendant, constructive or otherwise, as to the defective unsafe condition . . . [is] necessary to be shown”); *Fryer v. St. Louis-San Francisco Ry. Co.*, 63 S.W.2d 47, 51 (Mo. 1933) (explaining that liability under the FSAA “does not depend upon notice of defects or

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<sup>12</sup> Federal regulations, including 49 CFR§ 215.123, are “statute[s] enacted for the safety of employees.” Per 45 U.S.C. § 54a, any “regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title.”

upon negligence”); *Davidson v. Peoria & P. U. Ry. Co.*, 203 Ill.App. 498, 503 (Ill. Ct. App. 1916) (explaining that “a temporary defect and failure to work of an equipment required by the Safety Appliance Act creates a liability and subjects the defendant to the penalties and burdens imposed by that act, even though such failure arose from some defect unknown to the employer, which in the exercise of reasonable care he could not have ascertained and remedied”).

**B. The FSAA mandates that couplers function properly every single time.**

There are two recognized methods of demonstrating a violation of the FSAA. First, “[e]vidence may be adduced to establish some particular defect,” and second, “the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.” *Myers v. Reading Co.*, 331 U.S. 447, 483 (1947). In this case, Gallagher has presented ample evidence of a “particular defect;” i.e., an inoperative knuckle pin. Nevertheless, it is important to remember that “proof of an actual break or visible defect . . . is not a prerequisite to a finding that the statute has been violated.” *Myers*, 331 U.S. at 447. Indeed, “[t]he test in fact is the performance of the appliance.” *Id.* See also *Carter v. Atlanta, St. A. B. Ry. Co.*, 338 U.S. 430, 434 (1949) (explaining that “the absence of a ‘defect’ cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question”).

The District Court seemed to have a difficult time accepting the notion that a single failed coupling (or even repeated failed couplings in relatively rapid succession) constitutes a per se FSAA violation that subjects the railroad to absolute liability. This difficulty is illustrated by its questioning at the summary judgment hearing (“you’re not

arguing as a matter of law that every time there's a failure to couple there's a FSAA violation?"),<sup>13</sup> and by the fact that its ruling in BNSF's favor seems to rest primarily (and precariously) on the fact that the cars ultimately coupled. Indeed, the District Court repeated that fact like a mantra in concluding that "Gallagher's ability to ultimately couple the two cars successfully after aligning the drawbars indicates efficient coupling equipment." *Order Granting Summ Judg. at 9* (Add. 9).

To be clear, the law as written by Congress and as uniformly applied by the courts, is that when couplers have been placed in a position to operate on impact – i.e., when the drawbars have been aligned and at least one is open, as Gallagher testified they were in this case – they must function properly every single time they are used:

The duty imposed upon a common carrier engaged in interstate commerce by rail to equip and maintain on all cars used by it couplers coupling automatically by impact is an absolute one . . . It is not only the duty of the railroad to provide such couplers, but to keep them in such operative condition that they will always perform their functions. The test of compliance is the operating efficiency of the couplers with which the car is equipped.

*Chicago St. P. & O. Ry. Co. v. Muldowney*, 130 F.2d 971, 975 (8<sup>th</sup> Cir. 1942) (emphasis added); *see also Hiles*, 516 U.S. at 408-09 (explaining that "the SAA creates an absolute duty requiring not only that automatic couplers be present, but also that they actually perform").

Stated another way, the railroad's duty to provide couplers that couple automatically upon impact "is an absolute one requiring performance on the occasion in question." *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 98-99 (1950); *see also*

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<sup>13</sup> *Summ. Judg. Tr. at 28*.

*Kavorkian v. CSX Transp., Inc.*, 117 F.3d 953, 958 (6<sup>th</sup> Cir. 1997) (a FELA plaintiff makes a “sufficient showing” of an FSAA violation “by establishing that the train couplers failed to couple on the single impact in question”); *Maldonado v. Missouri Pac. R. Co.*, 798 F.2d 764, 767 (5<sup>th</sup> Cir. 1986) (explaining that the FSAA “imposes absolute liability upon a railroad for injuries sustained when the automatic couplers fail to perform ‘on the occasion in question’”) (emphasis added) (citation omitted). And because the only relevant inquiry in this case is how the couplers functioned “on the single impact in question,” the fact that they may have operated properly either before or after Gallagher’s receipt of injuries is completely immaterial. In *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, the Supreme Court explained that:

Since 1883 the Congress has made it unlawful for a railroad company such as respondent to use any car on its line ‘not equipped with couplers coupling automatically by impact.’ This Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence, and that the absence of a ‘defect’ cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question. The fact that the coupler functioned properly on other occasions is immaterial.

*Carter*, 338 U.S. at 433-34 (emphasis added); *see also Myers*, 331 U.S. at 483 (explaining that where the jury finds an FSAA violation “it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently and properly both before and after the occasion in question”) (emphasis added).

In light of the foregoing, it is evident that the District Court misapplied the law when it concluded that BNSF did not violate the FSAA because Gallagher was ultimately able to get the cars to couple. Accordingly, its Order should be reversed.

- C. **The record is replete with evidence from which a jury could infer that BNSF violated the FSAA and federal safety regulations on July 24, 2010.**
1. **The failure of rail cars to couple automatically upon impact creates a “nearly irrebuttable presumption” that the FSAA has been violated.**

In considering this appeal, it is critical to note that the failure of rail cars to couple, in and of itself, “creates the nearly irrebuttable presumption that the Act [FSAA] has been violated.” *Lisek v. Norfolk & W. Ry. Co.*, 30 F.3d 823, 829 (7th Cir. 1994) (emphasis added). As noted previously, the plaintiff makes a sufficient showing of a violation if there is “any probative evidence” that the “train couplers failed to couple automatically on the single impact in question.” *Kavorkian*, 117 F.3d at 958.

The only way a railroad defendant can avoid this “nearly irrebuttable presumption” is by “proving both (1) that the equipment was not properly set, *e.g.*, that the drawbars were not properly aligned or that one of the knuckles was not open, and (2) that a defect in the equipment did not cause the equipment to be improperly set, *i.e.*, the equipment became improperly set “during the ordinary course of railroad operations.”<sup>14</sup> *Kavorkian*, 117 F.3d at 958 (emphasis added); *see also Hiles*, 516 U.S. at 410 (explaining that “a court cannot reasonably find as a matter of law that an otherwise non-defective coupler has failed to perform when the drawbar has not been placed ‘in a position to operate on impact’”). Therefore, the burden is not on Gallagher to prove that the

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<sup>14</sup> Courts have interpreted “the ordinary course of railroad operations” to include such things as “the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different track.” *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570, 575 (6<sup>th</sup> Cir. 1994).

drawbars were properly aligned (although he has). Instead, the burden is on BNSF to prove they were not. *See Kavorkian*, 117 F.3d at 957 (“the burden of proof rests with the defendant to rebut the plaintiff’s case by showing that the drawbars were not properly aligned”); *DeBiasio v. Illinois Cent. R.*, 52 F.3d 678, 684 (7<sup>th</sup> Cir. 1995) (“the defendant railroad has the burden of proving that the couplers were not set properly at the time that they failed to couple automatically”) (citation omitted).

In this case, BNSF simply cannot meet its burden because Gallagher testified that the drawbars were properly aligned and that at least one knuckle was open during each and every unsuccessful coupling attempt, including the initial one when the cars rolled down the hump, into the bowl and actually coupled. As explained previously, the pin failed to drop on that occasion and the cars separated when Gallagher stretched the train.

In its memorandum, the District Court pays lip service to the FELA’s remedial nature (noting that “[c]ase law suggests that summary judgment against a plaintiff in a railroad case is rare”),<sup>15</sup> but goes on to play semantic games, asserting that Gallagher purportedly did not “testify unequivocally that the drawbars were actually aligned properly.” *Order Granting Summ. Judg. at 6* (Add. 6). In addition to being factually inaccurate, the District Court’s statement is tantamount to a ruling that Gallagher cannot state a viable FSAA claim in the absence of direct or “unequivocal” eyewitness testimony. Any such holding is in direct contravention of the FELA, under which it is well-settled that “circumstantial evidence alone can support a jury verdict.” *Lynch*, -- F.3d --, 2012 WL 52906 at \*7. Additionally, by holding that it is Gallagher’s duty to

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<sup>15</sup> *Order on Summ. Judg. at 7* (Add. 7).

prove that the drawbars were properly aligned (which he has), as opposed to the BNSF's duty to prove they were not, the District Court "erred by adding an element to the plaintiff's case not required by law." *Kavorkian*, 117 F.3d at 958. Accordingly, its Order should be reversed.

**2. There is ample evidence that the couplers were properly set and failed to couple upon impact, and that BNSF used a rail car equipped with an inoperative knuckle pin.**

In granting BNSF's motion the District Court found that Gallagher "has not presented threshold evidence of ineffective equipment." *Order Granting Summ. Judg. at 9* (Add. 9). In fact, nothing could be further from the truth, as the record is replete with indisputable evidence of ineffective equipment; specifically, couplers that failed to couple automatically upon impact, and an inoperative knuckle pin.

As noted above, Gallagher testified that when he first came upon the subject rail cars after they were sent down the hump, the drawbars were aligned and they appeared to be coupled. *Gallagher Dep., 146:16-20* (App. 19). This is to be expected, as cars are supposed to couple when sent down the hump. *See Gallagher Dep., 134:9-135:5* (App. 16); *Hawley Aff., ¶3* (App. 30-31); *Kuduk Aff., ¶3* (App. 34). The fact that they did not is evidence from which a jury could conclude that BNSF violated the FSAA.

Gallagher also testified (without equivocation) that although the drawbars were properly aligned and at least one knuckle was open, the cars failed to couple on a number of subsequent occasions because the knuckle pin on the trailing car was inoperative and would not drop. *Gallagher Dep., 184:23-185:14, 185:23-186:9* (App. 26-27). Gallagher's testimony in this regard is undisputed and it is, by itself, sufficient to

establish the existence of a genuine issue of material fact with respect to BNSF's violation of the FSAA. *See Myers* 331 U.S. at 483 (plaintiff's testimony that a safety appliance "was used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of insufficiency as to make an issue for the jury"); *Spotts v. Baltimore & O. R. Co.*, 102 F.2d 160, 162 (7<sup>th</sup> Cir. 1938) ("Assuming that the brake [a covered safety appliance] was properly set, as plaintiff testified, the fact that it did not work properly demonstrates, prima facie at least, its inefficiency."). BNSF apparently agrees, having argued in the court below that "[i]n cases such as this, where the plaintiff is the sole eyewitness to his own accident, the resolution will often turn on his credibility, and determinations of credibility are uniquely within the province of the jury." *Def. Resp. to Pl. Mot. for Summ. Judg. at 10*, quoting *Rivera v. Union Pac. R. Co.*, 868 F.Supp. 294, 299 (D. Colo. 1994).

Although Gallagher's testimony alone is sufficient to warrant a reversal, he also presented additional evidence of BNSF's FSAA and regulatory violations. For example, he offered the report of former FRA Motive Power and Equipment Specialist, Michael O'Brien, who opined that "[e]ach time the subject freight car failed to couple, the car was in violation of the Safety Appliance Act, § 20302(a)(1)(A)." *O'Brien Report at 7* (App. 51). O'Brien further opined that BNSF violated the Railroad Freight Car Safety Standards, specifically, 49 CFR § 215.123(d)(2), which prohibits railroad carriers from using a car that has an "inoperative" knuckle pin. *Id. at 11* (App. 55).

The District Court flatly rejected O'Brien's opinions, incomprehensibly concluding that he based his opinions entirely "on hypothetical situations posed to BNSF

employees during their depositions.” *Order Granting Summ. Judg. at 5* (Add. 5). A review of O’Brien’s report, however, reveals the court’s assertion to be inaccurate. Indeed, he reviewed and relied upon myriad sources of information, including, but certainly not limited to, employee depositions. The other materials O’Brien reviewed include BNSF accident and injury reports, BNSF safety rules, the Association of American Railroads Manual of Standards and Recommended Practices, federal safety statutes and regulations, witness statements, and discovery responses (*see* O’Brien Report at 2-3 (App. 46-47)), all of which are sources that experts typically rely on. Ultimately, the question of whether O’Brien’s opinions are worthy of consideration is one for the jury at trial, not for the District Court on summary judgment.

The District Court’s refusal to consider O’Brien’s opinions is all the more puzzling in light of the fact that they were corroborated by testimony from BNSF’s own management officials: General Foreman Carlos Canchola, Assistant General Car Foreman Jeff Jordan, and Trainmaster Tim Dingmann, all of whom, as noted previously, confirmed that a knuckle pin that fails to drop with the application of sufficient force constitutes a violation of the FSAA and/or federal safety regulations.

Not only did the District Court ignore Gallagher’s evidence, it also gave dispositive effect to the affidavit testimony of Phillip Mullen, a BNSF superintendent who speculated that “[t]he fact that the drawbars needed realignment after each coupling attempt establishes that it was their misalignment – and not a defective knuckle pin – that was preventing them from coupling.” *Mullen Aff.*, ¶5 (App. 65). The District Court agreed with Mullen’s unfounded hypothesis, concluding that “[t]he testimony of

Superintendent Mullen establishes that the drawbars would not have become misaligned if the cars to be coupled had been aligned properly from the beginning and in a position to couple upon impact.” *Order Granting Summ. Judg. at 9* (Add. 9).

There are a number of problems with the District Court’s reliance on Mullen’s affidavit. First, the assertions set forth therein are contradicted by Mullen’s own deposition testimony, in which he candidly acknowledged that employees may indeed need to manually adjust coupling equipment in situations where the knuckles come together and mate but the pin does not fall. *See Mullen Dep.*, 109:16-25 (App. 63).

Second, Mullen made no attempt to quantify the forces inherent in a failed coupling (either in practical or scientific terms), or to explain how those forces are in all cases per se insufficient to move the drawbars out of alignment.

Third, Mullen’s claim that drawbars cannot become misaligned from the force of an unsuccessful coupling is contradicted by Gallagher (as set forth above), by former hump foreman Gary Hawley (who explained that after an unsuccessful coupling, an employee has to separate the cars and “readjust the drawbars before attempting to couple the cars together”),<sup>16</sup> and by BNSF Trainmaster Derek Huffaker who, like Gallagher, has experienced such occurrences. Huffaker testified:

Q. Okay. Have you seen couplings where the cars came together, they actually coupled together, but the pin itself did not fall?

A. Yes.

Q. Have you seen situations in the hump [yard] where the couplers came together, but they went – they misaligned to the point that they pushed to the side and the pin didn’t fall?

A. Yes.

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<sup>16</sup> *Hawley Aff.*, ¶6 (App. 31).

Q. Okay. Did you see, then, where they had to be – cars had to be realigned so that the couplers came together more straight on so that the pin would fall?

A. Yes, I have.

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Q. Have you also seen it where they come together and they misalign and the pin doesn't fall on long drawbars?

A. Long drawbars, yes.

(Huffaker Dep., 27:17-28:4, 28:9-11, emphasis added.)

The trial court's function in considering a summary judgment motion is to determine whether fact issues exist, not to resolve them or make determinations as to the credibility of witnesses or the weight of the evidence. *See Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978); *Anderson v. Mikel Drilling Co.*, 257 Minn. 487, 102 N.W.2d 293, 299 (1960); *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). In other words:

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts.

*Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944) (emphasis added).

In granting summary judgment to BNSF the District Court engaged in improper fact finding, inappropriately gauged the credibility of witnesses, and weighed, or, more accurately, ignored overwhelming “probative evidence” tending to show that that the couplers “failed to couple automatically on the single impact in question.” *Kavorkian*, 117 F.3d at 958. Viewing that evidence in a light most favorable to Gallagher, it is clear

that at the very least he has established the existence of a genuine issue of material fact with respect to BNSF's violation of the FSAA and federal safety regulations (if he has not proven those violations as a matter of law). Therefore, District Court's summary judgment order should be reversed, and this case should be remanded to District Court with instructions to enter judgment for Gallagher on his FSAA claims or, in the alternative, for trial on those issues.

**III. THE DISTRICT COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT BNSF WAS NOT NEGLIGENT IN CONNECTION WITH THE INCIDENT OF JULY 24, 2010.**

In granting summary judgment to BNSF on Gallagher's negligence claim, the District Court concluded that "[t]he Court fails to see how a reasonably prudent person would foresee a potential danger given that Gallagher was working in an environment and under conditions that were consistent over time and experienced by numerous employees."<sup>17</sup> *Order Granting Summ. Judg. at 12* (Add. 12).

As an initial matter, it is critical to note that the alleged lack of foreseeability which was apparently of concern to the District Court poses no such worries for BNSF. Indeed, the railroad has admitted that injuries are foreseeable any time a coupler fails and an employee has to manually drawbars. *See Mullen Dep., 48:23-49:1, 50:6-9* (App. 60-62).

As set forth above, under the FELA it is not necessary that the railroad foresee the exact injury that occurs. Instead, it is sufficient if the railroad "might reasonably have

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<sup>17</sup> While it may be true that Gallagher's working conditions were "consistent over time," it is equally true, as established by the evidence in this case, that those working conditions were consistently substandard.

foreseen that an injury might occur.” *Green*, 763 F.2d at 808; *see also Boston & M. R. R. v. Talbert*, 360 F.2d 286, 290 (1st Cir. 1966) (holding that “negligence in gross which contributes to an injury is a sufficient basis for liability even though the particular accident might not have been anticipated”). Because BNSF’s has admitted its awareness of the potential for injuries suffered while manipulating drawbars, foreseeability is not an issue in this case.

Additionally, the relevant inquiry in a FELA negligence case is not, as the District Court apparently believed, whether the injured plaintiff’s working conditions were consistent over time. Instead, it is whether the railroad “knew or should have known ‘that prevalent standards of conduct were inadequate to protect [Gallagher] and similarly situated employees.’” *Urie v. Thompson*, 337 U.S. 163, 178 (1949). And of course, “[k]nowledge of inadequacy is a factual question for the jury.” *Villa v. Burlington N. & Santa Fe Ry. Co.*, 397 F.3d 1041, 1045 n. 4 (8<sup>th</sup> Cir. 2005).

**A. Under the FELA, BNSF owes its employees a duty to provide them with a safe place to work.**

Generally speaking, under the FELA, railroad employers owe their employees a non-delegable duty to provide them with a reasonably safe place to work. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352 (1943). Inherent in that duty is an obligation to provide safe premises, safe equipment, proper training, sufficient assistance, and suitable methods and tools to perform the assigned tasks. *See Staisor v. National R. Passenger Corp.*, 19 F. Supp. 2d 835, 844 (N.D. Ill. 1990); *see also Kalanick v. Burlington N. R. Co.*, 788 P.2d 901, 905 (1990). The railroad is also required to make inspections and will

be held to have constructive notice of dangers it could have discovered through those inspections. See *Beattie v. Elgin, J. & E. Ry. Co.*, 217 F.2d 863 (7<sup>th</sup> Cir. 1954); *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5<sup>th</sup> Cir. 1951); *Sears v. Southern Pac. Co.*, 313 F.2d 498 (9<sup>th</sup> Cir. 1963). The railroad breaches its duty under the FELA when it “knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform or protect its employees.” *Smith*, 617 N.W.2d at 439.

**B. BNSF negligently failed to provide Gallagher with safe equipment, sufficient training, and proper tools.**

In this case, Gallagher was injured while aligning drawbars, which are very heavy and can require a considerable amount of force to align. *Hawley Aff.*, ¶7 (App. 31); *Kuduk Aff.*, ¶7 (App. 34). In addition to the hazards posed by the weight of the equipment, Gallagher also produced evidence that the specific drawbar with which he was working at the time of his injuries had not been properly lubricated or cleaned, rendering it “stiff” and “hard to move.” *Gallagher Dep.*, 150:21-151:13, 198:24-199:22 (App. 20, 29). Hawley and Kuduk, who both had been long-time employees in the Northtown yard, confirmed BNSF’s lackadaisical attitude toward coupler maintenance. Indeed, Hawley estimated that “up to 75% of the time” drawbars “were not properly lubricated and would have dirt, grit, and other material that would make lining them more difficult.” *Hawley Aff.*, ¶10 (App. 32). Kuduk testified similarly, explaining that “[d]uring my years at the BNSF, including 2010, drawbars were very often not properly maintained,” in that “they lacked lubrication,” and were corrupted by “[d]irt, rust, and

other materials,” which would “make adjusting them much harder.” *Kuduk Aff.*, ¶11 (App. 35).

In its briefing to the District Court, BNSF conceded that it has “mechanical devices” (e.g., knuckle mates or alignment straps) that can be used to align a drawbar that “does not move with the application of minimal force.” *BNSF Memo. in Supp. of Mot. for Summ. Judg. at 21*. Unfortunately, BNSF not only failed to provide Gallagher with any training on how to use those devices, it did not even bother to inform him of their existence. *Gallagher Dep.*, 111:25-113:3, 117:19-118:1, 197:2-25, 198:11-23 (App. 10-12, 28-29). BNSF’s omissions in this regard preclude summary judgment because the courts have held that where an injured FELA plaintiff presents evidence that assistive equipment is available but not provided, the question of defendant’s negligence is one for the jury. *See, e.g., Rodriguez v. Delray Connecting Railroad*, 473 F.2d 819 (6<sup>th</sup> Cir. 1972); *Heater v. The Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1245 (7<sup>th</sup> Cir. 1974).

In *Rodriguez*, the plaintiff suffered back injuries while loosening rail spikes with a spike maul. He sued under the FELA alleging that the railroad was negligent in failing to provide him with adequate tools; specifically an automatic spike puller that would have eliminated the need for employees to manually operate a spike maul in most situations. 473 F.2d at 821. After a verdict in Rodriguez’s favor, the railroad appealed and the Sixth Circuit affirmed the plaintiff’s verdict, explaining that:

Generally a railroad’s responsibility in this regard is to provide tools that are reasonably safe and suitable for the use of the employee. *Chicago & N.W. R.R. Co. v. Bower*, 241 U.S. 470, 36 S.Ct. 624, 60 L.Ed. 1107 (1951). What is “reasonably” safe is affected to some extent by the alternatives. Here there was testimony that safety was an advantage of the hydraulic

spike remover. In view of this evidence and considering the special treatment afforded F.E.L.A. cases, we cannot say that the jury was not entitled to find the old maul method “unreasonable.” (Citation omitted.)

*Id.*

Likewise in this case, assistive tools (e.g. knuckle mates) would have provided a safety advantage. Former FRA Motive Power and Equipment Specialist Michael O’Brien noted that such devices “certainly ease the physical burden on train crew members when adjusting drawbars.” *O’Brien Report at 7* (App. 51). Viewing all of the evidence in a light most favorable to Gallagher, and accepting as true his factual allegations (as this Court must in reviewing the District Court’s grant of summary judgment), it is evident that there remains a genuine issue of material fact with respect to BNSF’s negligence. BNSF has conceded as much, having acknowledged that “there is conflicting evidence in the record” with respect to whether Gallagher was made aware of the subject tools. *BNSF Mem. in Supp. of Mot. for Summ. Judg. at 21.*

**C. BNSF utilized unsafe job procedures and failed to provide sufficient personnel at the Northtown Yard.**

At the time of his injuries Gallagher was working with the drawbar on a bulkhead flat car located a curved track. As noted above, bulkhead flat cars have long drawbars and are difficult to couple on curved tracks. There is ample evidence in the record that building trains that include cars with long drawbars on curved tracks “make[s] it more difficult to align drawbars and increase[s] the failure or pins dropping even though the drawbars are properly aligned.” *Hawley Aff., at ¶9* (App. 32). This, in turn, increases the

need for employees to go in between rail cars and manually align drawbars, which BNSF concedes elevates the risk of injuries. *Mullen Dep.*, 48:23-49:1, 50:6-9 (App. 60-62).

There is also evidence in the record that because of the difficulties associated with coupling cars with long drawbars on curved tracks, BNSF has a practice of building trains that include such cars on the higher numbered tracks, which are straight or have more gradual curves. *Dingmann Dep.*, 17:5-18, 45:10-46:9 (App. 39, 40-41); *Hawley Aff.*, ¶8 (App. 31); *Kuduk Aff.*, ¶10 (App. 35). BNSF obviously failed to follow its own custom and practice in this case, and the question of whether it acted reasonably in doing so is patently a question for the jury. *See Texas & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (explaining that “[w]hat is usually done may be evidence of what ought to be done”).

Finally, there is evidence that BNSF failed to provide sufficient personnel in the Northtown yard. In his affidavit, retired BNSF Training Coordinator Kuduk explained that switch crews used to consist of four workers, two of whom worked on the ground lining and adjusting drawbars. *Kuduk Aff.*, ¶15 (App. 36). This additional assistance “made the job considerably easier and lessened the risk of injury.” *Id.*

With respect to hump operations, Kuduk and Hawley noted that for the last several years, BNSF has used only one pin puller at Northtown. *Kuduk Aff.*, ¶3 (App. 34); *Hawley Aff.*, ¶4 (App. 31). When only one pin puller is working, they operate the pin lifter from the west side of the hump, which “opens the knuckle on the south end of the cars” but leaves the knuckle on the north end closed as they car roll down into the bowl. *Kuduk Aff.*, ¶¶3-4 (App. 34); *Hawley Aff.*, ¶6 (App. 31). Thus, when hump operations are

conducted using only one pin puller, only one knuckle is opened, which “significantly increases the likelihood of unsuccessful couplings.” *Hawley Aff.*, ¶6 (App. 31); *Kuduk Aff.*, ¶6 (App. 34). This is a dangerous practice, as Hawley explains:

Based on my years of experience as a switchman, hump foreman, and trainer, BNSF’s practice of humping cars with only one knuckle open increases the likelihood of failed couplings. Failed couplings require employees to go between cars to realign drawbars and open knuckles increasing their risk of injury. This is especially true when cars with long drawbars are humped into tracks with curves.

*Hawley Aff.*, ¶13 (App. 32).

It is well-settled that as part of its duty to provide a safe work environment, railroad employers must “provide sufficient manpower to complete work in a reasonably safe manner.” *Kalanick*, 788 P.2d at 905. Illustrative of the railroad’s duty in this regard is *Stone v. New York, C. & St. L. R. Co.*, in which the United States Supreme Court held that the question of whether the railroad has provided sufficient personnel is one for the jury to consider. In *Stone*, the plaintiff a member of one of defendant’s section crews removing old track ties. When he and his partner were unable to remove one of the ties his supervisor refused his request to provide additional workers and instead instructed Stone to “pull harder.” 344 U.S. 407, 408 (1953). Stone did, causing a back injury. *Id.* The trial court dismissed Stone’s claims on summary judgment, but the Supreme Court reversed, explaining:

We think this case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. (Citation omitted). The straw boss [supervisor] had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. . . The likelihood of injury to men pulling or lifting beyond their capacity is obvious. Whether the

straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was the culpable issue. To us it appears to be a debatable issue on which fair-minded men would differ. (Citations omitted). The experience with stubborn ties, the alternative ways of removing them, the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more than two men were usually used in these circumstances – all these facts comprise the situation to be appraised in determining whether respondent was negligent. Those circumstances were for the trier of facts to appraise.

*Id.* at 409 (emphasis added).

This case, like *Stone*, is similarly “peculiarly one for the jury.” There is ample evidence in the record that if BNSF had provided additional personnel, either at the top of the hump to pull pins and open the closed knuckles, or in the yard to help with aligning drawbars (as it used to do), Gallagher would not have been placed in a position to be injured. All of this is evidence from which a jury could easily infer that BNSF breached its duty to provide Gallagher with a reasonably safe place to work. Accordingly, there remains a genuine issue of material fact with respect to BNSF’s negligence. Indeed, it simply cannot be credibly argued that this is a case in which there is “zero probability either of employer negligence or that any such negligence contributed to the injury of an employee.”

### CONCLUSION

The evidence in this case establishes that BNSF used rail cars that were equipped with couplers that failed to couple “automatically by impact” in violation of the FSAA (49 U.S.C. § 20302(a)(1)(A)), and that it used a rail car that was equipped with an “inoperative” knuckle pin in violation of 49 CFR §215.123(d)(2). While Gallagher believes that the facts establishing BNSF’s statutory and regulatory violations are

undisputed and are thus sufficient to establish his entitlement to judgment as a matter of law, it is clear that at the very least, there are fact questions that remain in this regard. Either way, the District Court erred granting summary judgment to BNSF on Gallagher's FSAA claims.

There is also ample evidence in the record of BNSF's negligence; specifically its failure to properly inspect, maintain and repair its rail cars; its failure to properly train Gallagher on, or even inform him about, of the existence of equipment that would have assisted him in aligning drawbars; its failure to comply with its own practice of building trains that included cars with long drawbars on straight tracks; and its failure to provide sufficient personnel to ensure that the tasks it assigned to Gallagher could be performed safely. Accordingly, the District Court also erred in granting summary judgment to BNSF on Gallagher's FELA negligence claims.

In light of the foregoing, the District Court's Order should be reversed and the case should be remanded with instructions for the District Court to enter judgment in Gallagher's favor on his FSAA claims. Alternatively, the case should be remanded for a trial of Gallagher's FSAA and FELA negligence claims.

**Respectfully submitted,**

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